No. 11144

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER L. YOUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii

TERRITORY'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The appellant has not shown that this Court has or should take jurisdiction under Section 128 of the Judicial Code, Amended, (28 U.S.C.A. Sec. 225).

STATEMENT OF THE CASE

This whole appeal merely involves nine words *italicized* in the instruction hereinafter set forth. The facts of guilt of the appellant are not in question.

The Supreme Court of the Territory of Hawaii states:

"It may be taken as conceded by the defendant that with the elimination of the language 'but a doubt that you could give a reason for' the instruction correctly states the law." (Record p. 43.)

The appellant on page 3 of his brief sets forth only a *portion* of Territory's Instruction No. 9. The entire instruction defining "reasonable doubt" is as follows:

"TERRITORY'S INSTRUCTION NO. 9

"I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but *a doubt that you could give a reason for.*

A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon mortal evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it

is your duty to convict and if you have not such belief so formed it is your duty to acquit." (Record pp. 8-9.) (Emphasis ours.)

SUMMARY OF ARGUMENT

1. THE APPELLANT HAS NOT SHOWN THAT THIS COURT HAS OR SHOULD TAKE JURISDICTION OF THIS CASE UNDER SECTION 128 OF THE JUDICIAL CODE, AMENDED, (28 U.S.C.A. SEC. 225).

(a) Obviously a treaty or statute of the United States or any authority exercised thereunder is not involved herein. The only question is whether or not the Territory's instruction on "reasonable doubt" violates the "due process" clause of the Fifth and Fourteenth Amendments of the Constitution of the United States.

(b) The due process clause of the Fifth and Fourteenth Amendments means the same thing except the Fifth Amendment applies to the federal government and its instrumentalities. The Fourteenth Amendment applies to the several states.

Bowles v. Willingham, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892, 905

Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146, 40 S. Ct. 106, 64 L. Ed. 194, 199

United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609

Hibben v. Smith, 191 U.S. 310, 24 S. Ct. 88, 48 L. Ed. 195, 201

Taylor: Due Process of Law, Sec. 49, p. 107

Taylor: Due Process of Law, Sec. 14, p. 23

(c) The case does not involve any federal question but simply a general rule of law.

Kimbrel v. Territory of Hawaii (C.C.A. 9th), 41 Fed. (2d) 740, 740-741

Barrington v. Missouri, 205 U.S. 483, 27 S. Ct. 582, 51 L. Ed. 890

The City and County of San Francisco v. Itsell, 133 U.S. 65, 10 S. Ct. 241, 33 L. Ed. 570, 571

Giles v. Little, 134 U.S. 645, 10 S. Ct. 625, 33 L. Ed. 1062, 1063

City and County of San Francisco v. Jane Scott, 111 U.S. 768, 4 S. Ct. 688, 28 L. Ed. 593

United States v. Thompson, 93 U.S. 586, 23 L. Ed. 982

Allen v. McVeigh, 107 U.S. 433, 2 S. Ct. 558, 27 L. Ed. 572

West v. State of Louisiana, 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965

(d) The due process clause of the Fifth and Fourteenth Amendments does not prohibit the Territory of Hawaii from enforcing its criminal laws under appropriate statutory provisions and common law doctrines. It does not permit a test by this Court of every ruling made by a territorial court in the course of a trial.

Buchalter v. New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492, 1495-1496

Taylor: Due Process of Law, Sec. 551, p. 824

(e) Substantial or material error in an instruction to the jury in a criminal case in a court of the Territory of Hawaii does not necessarily violate the due process clause of the Fifth or Fourteenth Amendments.

Buchalter v. New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492, 1495-1496

Davis v. State of Texas, 139 U.S. 651, 11 S. Ct. 675, 35 L. Ed. 300

Taylor: Due Process of Law, Sec. 551, p. 824

(f) The presumption of innocense is as fundamental a concept of our law as the doctrine of reasonable doubt. But failure to instruct on the presumption of innocence has been held not to constitute a denial of due process under the Fourteenth Amendment.

Howard v. Fleming, 191 U.S. 126, 24 S. Ct. 49, 48 L. Ed. 121, 125

2. ASSUMING ARGUENDO THAT A FEDERAL QUESTION IS INVOLVED HEREIN, THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE SUCH FEDERAL QUESTION IS NOT SUBSTANTIAL.

This Court has already decided the issue involved herein adversely to the appellant.

Griggs v. United States, (C.C.A. 9th), 158 Fed. 572, 577-578

Louie Ding v. United States, (C.C.A. 9th), 246 Fed. 80

The appeal is therefore frivolous.

Equitable Life Ass. Society of the United States v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190, 192

The appellant's appeal has not presented a substantial federal question.

Fukunaga v. Territory of Hawaii, (C.C.A. 9th), 33 Fed. (2d) 396, 397

Stanworth v. United States, (C.C.A. 9th), 45 Fed. (2d) 158, 159

3. **THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, DID NOT ERR IN GIVING TO THE JURY TERRITORY'S INSTRUCTION NO. 9 ON REASONABLE DOUBT.**

(a) The language assigned as error in said instruction has been used by trial courts of Hawaii in their charge to juries on reasonable doubt since 1889.

King v. Ahop (1889), 7 Haw. 556, 560-561

Territory of Hawaii v. Robello (1910), 20 Haw. 7, 22-23, 31

Territory of Hawaii v. Buick (1923), 27 Haw. 28, 36, 40-41

(b) The United States Circuit Court of Appeals for the Ninth Circuit has already settled the issue raised herein adversely to the appellant.

Griggs v. United States, (C.C.A. 9th), 158 Fed. 572, 577-578

Louie Ding v. United States, (C.C.A. 9th), 246 Fed. 80, 83

(c) Territory's Instruction No. 9 considered and construed in toto is not erroneous.

Mansfield v. United States, (C.C.A. 8th), 76 Fed. (2d) 224, 230

(d) The appellant's criticism herein is "hypercritical."

Marshall v. United States, (C.C.A. 2nd), 197 Fed. 511, 512-513; Certiorari denied, 226 U.S. 207, 33 S. Ct. 112, 57 L. Ed. 379

(e) The language complained of herein or similar language has been used and upheld by a large number of federal courts.

United States v. Woods, (C.C.A. 2nd), 66 Fed. (2d), 262, 265

Murphy v. United States, (C.C.A. 3rd), 33 Fed. (2d), 896; Certiorari denied, 280 U.S. 584, 50 S. Ct. 35, 74 L. Ed. 634

Sotello v. United States, (C.C.A. 5th), 256 Fed. 721, 723-724

Colbeck v. United States, (C.C.A. 7th), 10 Fed. (2d) 401, 404; Certiorari denied, *Colbeck v. United States,* 271 U.S. 662, 46 S. Ct. 474, 70 L. Ed. 1138

United States v. Butler, Cas. No. 14,700, 1 Hughes 457, 25 Fed. Cas. 213, 226

United States v. Stevens, Cas. No. 16,392, 2 Hask. 164, 27 Fed. Cas. 1312, 1314

United States v. Johnson, 26 Fed. 682, 685

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United States v. Cassidy, 67 Fed. 698, 782

United States v. Guthrie, 171 Fed. 528, 532

United States v. Wilson, 176 Fed. 806, 809

United States v. Hill, 1 Fed. (2d), 954, 956

United States v. Sussman, 37 Fed. Supp. 294

Maupin v. United States, (C.C.A. 4th), 258 Fed. 607

(f) The instructions given by the trial court on the presumption of innocence, burden of proof and reasonable doubt fully protected the appellant.

Territory's Instruction No. 9 (Record pp. 8-9)

Territory's Instruction No. 11 (Record p. 9)

Defendant's Instruction No. 2 (Record p. 10)

Defendant's Instruction No. 3 (Record pp. 10-11)

Defendant's Instruction No. 4 (Record p. 11)

Defendant's Instruction No. 7 (Record p. 12)

(g) The term "reasonable doubt" is self-defining. Territory's Instruction No. 9 could not therefore be prejudicial.

United States v. Breen, (C.C.A. 2nd), 96 Fed. (2d) 782, 784

(h) The language used, considering the entire instruction, was favorable to the appellant and "is sustained by respectable authority."

Miles v. United States, 103 U.S. 304, 312, 26 L. Ed. 481, 484

Dunbar v. United States, 156 U.S. 185, 15 S. Ct. 325, 39 L. Ed. 390, 395

(i) The state courts are not as uniform as the federal courts in upholding instructions containing substantially the same language as that objected to herein, but the majority rule follows the federal cases cited herein.

Butler v. State, 102 Wis. 364, 78 N.W. 590, 592

Emery v. State, 101 Wis. 627, 78 N.W. 145, 152-155

State v. Patton, 66 Kan. 486, 71 Pac. 840, 841

State v. Fox, 116 Kan. 180, 225 Pac. 1042

People v. Guidici, 100 N.Y. 503, 3 N.E. 493, 495-496

People v. Lagroppo, 90 App. Div. 219, 86 N.Y.S. 116, 126

State v. Serenson, 7 S.D. 277, 64 N.W. 130, 132

State v. Grant, 20 S.D. 164, 105 N.W. 97, 99

State v. Sonnenschein, 37 S.D. 585, 159 N.W. 101, 106

State v. Merry, 136 Me. 243, 8 Atl. (2d) 143, 153

State v. Butler, 148 S.C. 495, 146 S.E. 418, 419

Bryant v. State, 197 Ga. 641, 30 S.E. (2d) 259, 269

State v. Jefferson, 43 La. Ann. 995, 10 So. 199, 200

King v. State, 17 Ala. App. 536, 87 So. 701, 702-703

Wallace v. State, 41 Fla. 547, 26 So. 713, 723-725

State v. Dunn, 159 Wash. 608, 294 Pac. 217, 218-219

People v. Grove, 284 Ill. 429, 120 N.E. 277, 281

State v. Gilbert, 8 Idaho 346, 69 Pac. 62, 63-64

State v. Morey, 25 Ore. 241, 36 Pac. 573, 577-578

People v. Steubenvoll, 62 Mich. 329, 28 N.W. 883, 884, 885

State v. Sauer, 38 Minn. 438, 38 N.W. 355

People v. Yun Kee, 8 Cal. A. 82, 96 Pac. 95

Mansfield v. United States, 76 Fed. (2d) 224, 230

ARGUMENT

1. THE APPELLANT HAS NOT SHOWN THAT THIS COURT HAS OR SHOULD TAKE JURISDICTION OF THIS CASE UNDER SECTION 128 OF THE JUDICIAL CODE, AMENDED, (28 U.S.C.A. SEC. 225).

Section 128 of the Judicial Code, Amended, (28 U.S.C.A. Sec. 225) provides in part:

"(a) . . . The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions.

Fourth. In the Supreme Court of the Territory of Hawaii . . . in all civil cases, civil or criminal,

wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; . . ."

The appellant did not object in the trial court or in the Supreme Court of the Territory of Hawaii to prosecution's Instruction No. 9, (Record pp. 8-9), on constitutional grounds or on the basis of a statute or treaty of the United States, or any authority exercised thereunder.

The appellant has not based his objection to said instruction in this Court on the ground that a federal question is involved other than to state: "The jurisdiction of this court to review the final judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 128 of the Judicial Code (28 U.S.C.A., Sec. 225)." (Appellant's Brief, p. 2.) The only issue raised by the appellant in this Court is that the trial court erred in giving prosecution's Instruction No. 9, (Record pp. 8-9), by including therein the following nine words: "a doubt that you could give a reason for." (Appellant's Brief, p. 3.)

(a) Obviously a treaty or statute of the United States or any authority exercised thereunder is not involved herein. The only question is whether or not the Territory's instruction on "reasonable doubt" violates the "due process" clause of the Fifth and

Fourteenth Amendments of the Constitution of the United States.

The Fifth Amendment of the Constitution provides, ". . . nor be deprived of life, liberty, or property without due process of law; . . ." Const. Am. 1 to 13, U.S.C.A. p. 172.

The Fourteenth Amendment of the Constitution provides, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ." Const. Am. 14 to end, U.S.C.A. p. 69.

(b) The due process clause of the Fifth and Fourteenth Amendments means the same thing except the Fifth Amendment applies to the federal government and its instrumentalities. The Fourteenth Amendment applies to the several states.

The restraints placed on the federal government by the due process clause of the Fifth Amendment in the exercise of legislative power is no greater than those imposed upon the several states by the due process clause of the Fourteenth Amendment.

Bowles v. Willingham (1944), 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892, 905

Hamilton v. Kentucky Distilleries & W. Co. (1919), 251 U.S. 146, 40 S. Ct. 106, 64 L. Ed. 194, 199

United States v. Darby (1941), 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609

In *Hibben v. Smith* (1903), 191 U.S. 310, 24 S. Ct. 88, 48 L. Ed. 195, the Supreme Court of the United States states at *page 201:*

> "The 14th Amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the 5th Amendment against similar legislation by Congress; . . ."

The words "due process of law" mean the same in both the Fifth and Fourteenth Amendments. Taylor: Due Process of Law, Sec. 49, p. 107.

In Due Process of Law, supra, Taylor, in referring to the words "due process of law" in the Fifth Amendment, states in Section 14, page 23:

> "The conclusion is equally irresistible that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was in the same sense and with no greater extent; . . ."

It therefore follows that decisions involving the due process clause of the Fourteenth Amendment are authority herein.

(c) This case does not involve any federal question but simply a general rule of law.

Even if it were to be assumed arguendo, that the trial court committed error in giving Territory's Instruction No. 9 on "reasonable doubt" to the jury by including therein the words, "but a doubt that you could give a reason for," (Record pp. 8-9), it is difficult to see how such error, if any, infringes the personal life and liberty of the defendant in violation of the Fifth and Fourteenth Amendments of the Constitution, or involves a statute or treaty of the United States or any authority exercised thereunder.

When the question of what is a "reasonable doubt" arises, we of the Territory of Hawaii look first to the decisions of the Supreme Court of the Territory of Hawaii and then to the decisions of other jurisdictions because the question appears to us to be essentially one of local and general law rather than one involving a federal question.

In *Kimbrel v. Territory of Hawaii,* (C.C.A. 9th, 1930), 41 Fed. (2d) 740, the Court in dismissing an appeal states at *pages 740-741:*

> ". . . the question whether the charge contained in the complaint or information is sufficient under the statute is a question of general law, and does not involve either the Constitution or laws of the United States."

Accord: *Barrington v. Missouri* (1907), 205 U.S. 483, 27 S. Ct. 582, 51 L. Ed. 890.

In *The City and County of San Francisco v. Itsell* (1890), 133 U.S. 65, 10 S. Ct. 241, 33 L. Ed. 570, the Supreme Court of the United States states at *page 571:*

> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States."

In *Giles v. Little* (1890), 134 U.S. 645, 10 S. Ct. 625, 33 L. Ed. 1062, 1063, the Supreme Court dismissed a writ of error for lack of jurisdiction holding that the construction of a will was based on general rules of law and upon local statutes and not on the Constitution, laws or treaties of the United States.

See also:

City and County of San Francisco v. Jane Scott (1884), 111 U.S. 768, 4 S. Ct. 688, 28 L. Ed. 593

United States v. Thompson (1877), 93 U.S. 586, 23 L. Ed. 982

Allen v. McVeigh (1883), 107 U.S. 433, 2 S. Ct. 558, 27 L. Ed. 572

West v. State of Louisiana (1904), 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965

(d) The due process clause of the Fifth and Fourteenth Amendments does not prohibit the Territory of Hawaii from enforcing its criminal laws under appropriate statutory provisions and common law doctrines. It does not permit a test by this Court of every ruling made by a territorial court in the course of a trial.

Buchalter v. New York (1943), 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492, 1495-1496

Taylor: Due Process of Law, Sec. 551, p. 824

(e) Substantial or material error in an instruction to the jury in a criminal case in a court of the Territory of Hawaii does not necessarily violate the due process clause of the Fifth or Fourteenth Amendment.

In *Buchalter v. New York, supra,* the Supreme Court of the United States states at *pages 1495-1496:*

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions

of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and *common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of trial in a state court.*" (Emphasis ours.)

Again at page 1496, we find the following:

". . . As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

In *Davis v. State of Texas* (1891), 139 U.S. 651, 11 S. Ct. 675, 35 L. Ed. 300, the Supreme Court of the United States in dismissing the writ of error held that substantial error in an instruction to the jury in a criminal case in a state court does not violate the due process clause of the Fourteenth Amendment.

In "Due Process of Law," by Taylor, Section 551 at page 824, we find the following:

"A substantial error in the charge to the jury in a criminal case in a state court does not deprive the prisoner of the equal protection of the laws or of due process or abridge his immunities, within the Fourteenth Amendment. A writ of error to review the judgment of the highest tribunal of a state

cannot be maintained in the absence of a federal question giving jurisdiction . . ."

(f) The presumption of innocence is as fundamental a concept of our law as the doctrine of reasonable doubt. But failure to instruct on the presumption of innocence has been held not to constitute a denial of due process under the Fourteenth Amendment.

Howard v. Fleming (1903), 191 U.S. 126, 24 S. Ct. 49, 48 L. Ed. 121, 125

2. ASSUMING ARGUENDO THAT A FEDERAL QUESTION IS INVOLVED HEREIN, THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE SUCH FEDERAL QUESTION IS NOT SUBSTANTIAL.

Furthermore, irrespective of the foregoing, this Court has already decided the issue involved herein adversely to the appellant.

Griggs v. United States, (C.C.A. 9th), 158 Fed. 572, 577-578

Louie Ding v. United States, (C.C.A. 9th), 246 Fed. 80

This appeal is therefore frivolous.

Equitable Life Ass. Society of the United States v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190, 192

The appellant's appeal has not presented a substantial federal question.

Fukunaga v. Territory of Hawaii, (C.C.A. 9th, 1929), 33 Fed. (2d) 396, 397

Stanworth v. United States, (C.C.A. 9th, 1930), 45 Fed. (2d) 158, 159

3. THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, DID NOT ERR IN GIVING TO THE JURY TERRITORY'S INSTRUCTION NO. 9 ON REASONABLE DOUBT.

The only portion of this entire instruction which the appellant in this Court and in the Supreme Court of the Territory of Hawaii has assigned as reversible error reads: ". . . but a doubt you can give a reason for . . ." (Appellant's Brief, p. 4; Record p. 8.)

(a) The language assigned as error in said instruction has been used by trial courts of Hawaii in their charge to juries on reasonable doubt since 1889.

In *King v. Ahop* (1889), 7 Haw. 556, 560-561, the defendant was convicted of murder which was affirmed. The Supreme Court of Hawaii states at *page 560:*

> ". . . the Court charged . . . from notes to *Commonwealth vs. McKie,* 1 Leading Crim. Cases, pages 320-321:
>
> 'But if a defendant in a criminal case has a right to have the jury instructed that they must be satisfied of his guilt beyond a reasonable doubt, the question arises, what is a reasonable doubt? It has been defined to be *a doubt for which a reason could be given.* It certainly must be a serious and substantial doubt, not the mere possibility of a doubt . . .' " (Emphasis ours.)

Again at *page 561:*

> "We are of opinion that the jury were rightly instructed by the Court in this charge."

In *Territory of Hawaii v. Robello* (1910), 20 Haw. 7, 22-23, substantially the same instruction on reasonable doubt was given as that complained of herein and it reads as follows:

> "The Jury are instructed that the doubt which will entitle defendants or any of them, to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, *but a doubt that you could give a reason for.*
>
> 'A reasonable doubt is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or not an abiding belief that defendants are guilty and if you have such belief so formed, it is your duty to convict. You should take all the testimony and all the circumstances into account and act as you have an abiding belief the fact is.' " (Emphasis ours.)

The Court at *page 31* held that no error was committed.

The same instruction was before the Supreme Court of the Territory of Hawaii in *Territory of Hawaii v. Buick* (1923), 27 Haw. 28, 36, 40-41, and was again approved.

This instruction has been given in three capital cases that have been before the Territorial Supreme Court for review. (Record pp. 41, 41-42.)

(b) The United States Circuit Court of Appeals for the Ninth Circuit has already settled the issue raised herein adversely to the appellant.

In *Griggs v. United States,* (C.C.A. 9th, 1908), 158 Fed. 572, the plaintiff in error was jointly indicted with another for the crime of obtaining money by false pretenses and was convicted therefor. The Court at *pages 577-578* states:

> "Counsel for plaintiff in error proferred an instruction on the subject of reasonable doubt. The court declined to instruct as requested, and on that subject instructed the jury as follows:
>
> 'The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined by you; *but it is a doubt which must arise from the evidence,* or lack of evidence, *and for which some reason can be given.*'
>
> Error is assigned both to the refusal to charge as requested and to the charge as given; but the only question to be determined here is whether there is reversible error in the instruction which was given. In *Owens v. United States,* 130 Fed. 283, 64 C.C.A. 529, in reversing the judgment of the trial court for error in a certain instruction,

this court thought it proper to suggest that the following definition of 'reasonable doubt,' given to the jury by the court below, should be omitted on a new trial:

'A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt *for which a reason can be given,* which reason must be based upon the evidence or want of evidence.'

And this court remarked:

'A doubt arising out of evidence is a mental operation for which it may often be very difficult, and indeed impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon; for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused. Such a doubt has been often and correctly defined as a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.'

It will be observed that this court, while disapproving the phraseology of the instruction, carefully refrained from expressing the opinion that it was ground for reversing the judgment then under consideration. In the definitions of 'reasonable doubt' there is hopeless confusion in the adjudicated cases. Definitions approved in some courts have been reversible error in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or eluci-

dation. Said Mr. Justice Woods in *Miles v. United States,* 103 U.S. 312, 26 L. Ed. 481:

'Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.'

The definition which was given by the court below in the present case was given in substance by Chief Justice Waite in *United States v. Butler,* 1 Hughes (U.S.) 457, Fed. Cas. No. 14,700, and has been sustained in a number of cases, and, among others, in the following federal decisions: *United States v. Stevens,* 2 Hask. (U.S.) 164, Fed. Cas. No. 16,392; *United States v. Johnson* (C.C.) 26 Fed. 682; *United States v. Jackson* (C.C.) 29 Fed. 503; *United States v. Jones* (C.C.) 31 Fed. 718; *United States v. Cassidy* (D.C.) 67 Fed. 782. The objection to that definition lies in the danger of conveying the impression to the jurors that the reason for the doubt must be one that can be expressed in words. For this reason it has been rejected in a number of jurisdictions. In others, with better reason, we think, it has been disapproved, but held not to constitute reversible error. *State v. Sauer,* 38 Minn. 438, 38 N.W. 355; *People v. Stubenvoll,* 62 Mich. 329, 28 N.W. 883; *State v. Morey,* 25 Or. 241, 35 Pac. 655, 36 Pac. 573. And we so hold in the present case." (Emphasis ours.)

The *Griggs case, supra,* carefully limited the legal effect of the comments in *Owens v. United States,* (C.C.A. 9th, 1904), 130 Fed. 279, 283, on a similar instruction of reasonable doubt, which were in the nature of obiter dicta, by definitely holding that the

giving of such an instruction did not constitute reversible error.

In *Louie Ding v. United States,* (C.C.A. 9th, Rehearing denied), 246 Fed. 80, Louie Ding and Louie Lung Gin together with others were indicted and convicted for the crime of conspiracy. At *page 83,* the Court states:

> "In defining a 'reasonable doubt' the court charged as follows:
>
> 'Now, a "reasonable doubt" *is just such a doubt which you can give a reason.* When a juror is convinced to a moral certainty of the truth of the fact, then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural, or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions.'
>
> Defendants object to the declaration that a reasonable doubt is such a doubt as the jury are able to give a reason for. We concede that the phraseology objected to is not a clear explanation, but when it is considered in connection with the whole instruction there was no reversible error. This court so held in *Griggs v. United States,* 158 Fed. 572, 85 C.C.A. 596, and similar ruling was made by the Court of Appeals for the Second Circuit in *Marshall v. United States,* 197 Fed. 511, 117 C.C.A. 65." (Emphasis ours.)

The language objected to in both the Ding case and the case at bar is almost identical and the Court

held that when the whole instruction was considered there was no reversible error.

(c) Territory's Instruction No. 9 considered and construed in toto is not erroneous.

In *Mansfield v. United States,* (C.C.A. 8th, 1935), 76 Fed. (2d) 224, the appellants were indicted and convicted of using the mails and of conspiracy to use the mails to defraud. The Court states at *page 230:*

> "It is contended that the court erred in defining reasonable doubt as a doubt for which a reason could be assigned. Although no proper exception was taken preserving the question for review [*McCutchan v. United States* (C.C.A. 8) 70 F. (2d) 658; *Stassi v. United States* (C.C.A. 8) 50 F. (2d) 526], we are satisfied that no prejudice resulted from the form and substance of the instruction, which was as follows:
>
> 'These underlying principles are that the law presumes the innocence and not the guilt of the accused. This presumption attends and protects them and each of them until the Government has overcome such presumption by testimony which may satisfy you of their guilt beyond a reasonable doubt.
>
> By reasonable doubt I do not mean the mere fanciful, flimsy, fictitious notion that the defendants or either of them might be innocent but I mean, as the word implies, a doubt founded in reason *and a doubt for which you could give a reason.* It means a substantial doubt arising on the testimony or from lack of testimony, and such a

doubt as would cause you as reasonable men to halt and to hesitate before you acted in the more serious matters of your own concerns.'

An instruction in almost identical language was approved by the Supreme Court in *Hopt v. Utah,* 120 U.S. 430, 7 S. Ct. 614, 30 L. Ed. 708. See, also, *Wilson v. United States,* 232 U.S. 563, 34 S. Ct. 347, 58 L. Ed. 728; *United States v. Woods* (C.C.A. 2) 66 F. (2d) 262; *Murphy v. United States* (C.C.A. 3) 33 F. (2d) 896; *Colbeck v. United States* (C.C.A. 8) 14 F. (2d) 801, 803; *Estabrook v. United States* (C.C.A. 8) 28 F. (2d) 150; *Pettine v. Territory of New Mexico* (C.C.A. 8) 201 F. 489; *Dunbar v. United States,* 156 U.S. 185, 15 S. Ct. 325, 39 L. Ed. 390; *Sotello v. United States* (C.C.A. 5) 256 F. 721; *Maupin v. United States* (C.C.A. 4) 258 F. 607.

In *Colbeck v. United States, supra,* this court said: 'It is also contended that there should be a reversal because the court erred in its instruction to the jury on the subject of reasonable doubt. The particular respect in which it is claimed the court erred on that subject is that it charged the jury that a reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence. If the court had stopped there the contention would be a serious one. But that was not all of the instruction. Taking the court's entire charge on that subject it is the same in substance as the instruction given in *Hopt v. Utah,* 120 U.S. 430, 7 S. Ct. 614, 30 L. Ed. 708, which the Supreme Court held did not constitute reversible error.'

The part of the instruction complained of was qualified and explained by the sentence immediately

following: 'Such doubt as would cause you as reasonable men to halt and to hesitate before you acted in the more serious matters of your own concerns.' The instruction informs the jury that it was their duty to acquit if the evidence left them with such a doubt of guilt as a reasonable man would decline to act upon his own affairs. *Sotello v. United States, supra.*" (Emphasis ours.)

In the *Mansfield case, supra,* the phrase used is "a doubt for which you could give a reason," while in the case at bar the phrase used is, ". . . a doubt that you could give a reason for." (Record p. 8.) And the Court held that the inclusion of the above phrase was not error. This case is from the same circuit as *Pettine v. Territory of New Mexico,* (C.C.A. 8th, 1912), 201 Fed. 489, and *Ayer v. Territory of New Mexico,* (C.C.A. 8th, 1912), 201 Fed. 497, cited by appellant on pages 5-7, and 7 respectively of his brief in support of his contention that the phrase contained in the instruction under consideration constituted reversible error.

(d) The appellant's criticism herein is "hypercritical."

In *Marshall v. United States,* (C.C.A. 2nd, 1912), 197 Fed. 511; Certiorari denied, 226 U.S. 207, 33 S. Ct. 112, 57 L. Ed. 379, the appellant was convicted of using the mails to defraud, and appealed. The case

was reversed on other grounds but the Court held that an instruction on reasonable doubt did not constitute error and stated at *pages 512-513:*

> "There was no error in charging the jury that 'by the term reasonable doubt is meant not a capricious doubt, *but a substantial doubt—a doubt that you can give a reason for if the court called on you to give one.*' The definition of 'reasonable doubt' as being a doubt for which a reason can be given is frequently adopted by trial judges. The criticism that the charge carried with it an implied threat that the jury might be called upon to explain to the court the reason which induced them to acquit if they found a verdict of not guilty, is hypercritical." (Emphasis ours.)

(e) The language complained of herein or similar language has been used and upheld by a large number of federal courts.

In *United States v. Woods,* (C.C.A. 2nd, 1933), 66 Fed. (2d) 262, the appellants and others were indicted and convicted of conspiracy. The Court states at *page 265:*

> "The court charged that a reasonable doubt was one *for which a reason could be assigned.* While we do not approve such a definition, it has in this circuit been held not to be erroneous . . ." (Emphasis ours.)

In *Murphy v. United States,* (C.C.A. 3rd, 1929), 33 Fed. (2d) 896; Certiorari denied, 280 U.S. 584, 50 S. Ct. 35, 74 L. Ed. 634, the appellant was con-

victed of unlawfully importing merchandise into the United States. During the trial the Court gave the following instruction on reasonable doubt, at *page 896, footnote 1:*

> " 'The burden of proof is on the Government to establish their guilt, and the burden of proof is on the Government to establish their guilt beyond a reasonable doubt.
>
> "Reasonable doubt" are words hardly requiring to be defined. You know what "reasonable doubt" is. It is not incumbent upon the Government to prove the guilt of these men beyond all doubt, because very few human affairs can be shown to exist beyond all possible doubt. "*Reasonable doubt" means a doubt for which some sound reason can be assigned in your minds.* It does not mean a doubt which may be conjured up, as sometimes is done, for the purpose of avoiding an unpleasant duty. One court has said it is an honest, conscientious misgiving generated by truth, or the want of it; such a state of proof as fails to convince your judgment, your conscience and to satisfy your reason of the guilt of the accused. That is about all there is to that.' " (Emphasis ours.)

The sole error assigned in *Murphy v. United States, supra,* was the emphasized portion of the instruction set out above. The Court held this was not error.

The portion of the instruction complained of in the case at bar is designed to enable each juror to distinguish in his own mind a reasonable doubt from a

"conjured up" doubt as in *Murphy v. United States, supra,* or to distinguish a "reasonable doubt" from "a slight doubt" . . . "a probable doubt . . . a possible doubt . . . a conjectural doubt . . . an imaginary doubt." (Record pp. 8-9.) It does not mean that he must give such reason to the court or to his fellow jurymen or to anyone. It simply provides each juror with a yardstick that he can use in determining whether or not the government has sustained the burden of proof required by law. Neither the burden of proof nor quantum of proof is changed in any respect.

In *Sotello v. United States,* (C.C.A. 5th, 1919) 256 Fed. 721, the appellant was indicted and convicted of transporting munitions of war for export. The Court state at *pages 723-724:*

> "It is assigned as error that the court, in charging the jury upon the question of reasonable doubt, said *that a reasonable doubt must be a doubt for which a sensible man could give a good reason,* which reason must be based upon the evidence or the want of evidence. The following is the part of the court's charge which dealt with the subject of reasonable doubt:
>
> 'The defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt of his guilt you

should acquit him. By reasonable doubt you will understand that the court does not mean fanciful *conjecture which an imaginative man may conjure up, but the doubt which reasonably flows from the evidence, or the want of evidence, and a doubt for which the sensible man could give a good reason,* which reason must be based on the evidence, or the want of evidence, such a doubt as a sensible man would act upon or decline to act upon in his own concerns. If you have such a doubt, the defendant is entitled to the benefit of that doubt and you should acquit him; but if you are satisfied from the evidence that he is shown to have committed the offense with which he is charged, you should find him guilty.'

The part of the instruction of which complaint is made was qualified and explained by the language which immediately followed it, forming a part of the same sentence—'*such a doubt as a sensible man would act upon or decline to act upon in his own concerns.*' The instruction as a whole was such as to make it known to the jury that it was their duty to acquit the defendant, if the evidence left them with such a doubt of his guilt as a sensible man would act upon or decline to act upon in his own concerns. *The instruction as a whole was such that the defendant could not have been prejudiced by it. Hopt v. Utah,* 120 U.S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708.

Of other rulings complained of no more need be said than that no one of them constituted reversible error." (Emphasis ours.)

In the *Sotello case, supra,* the Court held that the language objected to in the instruction was explained

by the language that followed it and that was sufficient. The same principle applies to the case at bar. The language preceding and following the phrase, "but a doubt that you could give a reason for" (Record pp. 8-9), fully explains it. The language used in the second paragraph of the instruction contains the heart of the classic definition of "reasonable doubt" given by Chief Justice Shaw in *Commonwealth v. Webster,* 5 Cush. (Mass.) 295, at page 320, 52 Am. Dec. 711, at 731.

In *Colbeck v. United States,* (C.C.A. 7th, 1925), 10 Fed. (2d) 401, 404; Certiorari denied, *Colbeck v. United States,* 271 U.S. 662, 46 S. Ct. 474, 70 L. Ed. 1138, the Court held that it was not error to give an instruction on reasonable doubt which contained the following: ". . . A reasonable doubt, gentlemen, is just such a doubt as the name implies—a doubt based upon reason, . . ."

Chief Justice Waite in charging the jury on reasonable doubt in *United States v. Butler,* (Circuit Court D. So. Carolina, 1877), Cas. No. 14,700, 1 Hughes 457, 25 Fed. Cas. 213 at page 226, stated: ". . . It must be a doubt for which a reason may be assigned . . ."

Accord: *United States v. Stevens,* (Circuit Court D. Maine, 1877), Cas. No. 16,392, 2 Hask. 164, 27 Fed. Cas. 1312 at page 1314.

In *United States v. Johnson,* (Circuit Court, S.D. Georgia, 1885), 26 Fed. 682, 685, Judge Speer in charging the jury on "reasonable doubt" included the phrase: ". . . a doubt for which a good reason, arising from the evidence, can be given . . ."

Accord: *United States v. Jackson,* (Circuit Court S.D. Georgia, 1886), 29 Fed. 503.

Judge Morrow in *United States v. Cassidy,* (District Court N.D. California, 1895), 67 Fed. 698, included in his charge to the jury on reasonable doubt at *page 782*, the phrase: "a doubt for which a good reason can be given, . . ."

Judge Sater in *United States v. Guthrie,* (District Court S.D. Ohio E.D., 1909), 171 Fed. 528 at page 532, included in his charge to the jury on reasonable doubt the words: ". . . not a mere possible, or conjured up, or imaginary doubt, but one for which you can give a reason, . . ."

In *United States v. Wilson,* (Circuit Court S.D. Florida, 1910), 176 Fed. 806, at page 809, the Court in charging the jury on reasonable doubt, stated: "A reasonable doubt does not mean every doubt that may

flit through your minds in the consideration of this case, *but a doubt for which you can give a reason if called on to do so.*" (Emphasis ours.)

In *United States v. Hill,* (District Court D. Maryland, 1924), 1 Fed. (2d) 954, at page 956, the Court charged the jury on "reasonable doubt" as follows:

> ". . . The burden of proof is on the United States to satisfy the jury of his guilt. And the jury must be satisfied beyond a reasonable doubt, before they are authorized to find a verdict of guilty. To be convinced beyond a reasonable doubt is to have an abiding conviction to a moral certainty of the guilt of the accused. Such a doubt as would justify the acquittal of the defendant *must be a doubt for which you can give a reason.*" (Emphasis ours.)

In *United States v. Sussman,* (District Court E.D. Penn., 1941), 37 Fed. Supp. 294, the defendants moved for a new trial including as one of their grounds therefor, that the court committed error in giving that portion of the charge on reasonable doubt set out on page 296, which reads: ". . . '*The term reasonable doubt means a doubt for which a good reason can be given* in the light of all the evidence.' " (Emphasis ours.) This was overruled on the basis that considering the charge as a whole the jury was not misled and the defendants were not "wronged."

In *Maupin v. United States,* (C.C.A. 4th, 1919), 258 Fed. 607, the conviction of the plaintiff in error was affirmed with the Court stating:

> ". . . The case is brought here on the narrowest technical ground. On the subject of reasonable doubt and the presumption of innocence, the following instruction was given to the jury:
>
> 'Where a defendant is placed on trial charged with an offense, the law presumes that he is innocent, and it devolves on the government to prove every material fact necessary to constitute the offense charged against him to the satisfaction of the jury beyond a reasonable doubt, and if the government has failed to do that then it is the duty of the jury to acquit the defendant.'
>
> This covers the subject fully, and it is of no consequence that the instruction was not in the language requested by counsel . . ."

The instruction upheld in the *Maupin case, supra,* does not even attempt to define "reasonable doubt" and it was held sufficient.

(f) The instructions given by the trial court on the presumption of innocence, burden of proof and reasonable doubt fully protected the appellant.

The jury was repeatedly admonished by the court that the burden of proof was on the Territory and that the defendant was presumed to be innocent and could not be convicted until the Territory had proven

him guilty beyond a reasonable doubt. (Territory's Instruction No. 9.) (Record pp. 8-9.)

"TERRITORY'S INSTRUCTION NO. 11

"You are instructed that the *burden is on the Territory to prove beyond a reasonable doubt* that the defendant's treatment of Rose Dolim was not for the purpose of saving her life." (Record p. 9.) (Emphasis ours.)

"DEFENDANT'S INSTRUCTION NO. 2

"I instruct you that the issue which you are to try is that presented by the indictment, and the defendant's plea of not guilty in this case. For be it remembered that the plea of not guilty puts in issue and requires the *prosecution to prove each and every material allegation in the indictment beyond all reasonable doubt.*" (Record p. 10.) (Emphasis ours.)

"DEFENDANT'S INSTRUCTION NO. 3

"The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should permit himself to be to any extent influenced because or on account of the indictment against the defendant. *You are instructed that the defendant is presumed by the law to be innocent of the crime charged against him, in each and all its parts, and this presumption shields and protects him throughout each and every stage of the trial until overcome by satisfactory evidence, which convinces you of his guilt as charged beyond all reasonable doubt.*" (Record pp. 10-11.) (Emphasis ours.)

"DEFENDANT'S INSTRUCTION NO. 4

"Moreover, I instruct you that this presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and is binding upon you in this case, and it is your duty to give the defendant the full benefit of this presumption and to acquit him unless, as I have already stated, the evidence satisfies you of his guilt beyond all reasonable doubt." (Record p. 11.)

"DEFENDANT'S INSTRUCTION NO. 7

"Under the law no jury can convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of crime is not suspicion, not mere probabilities, *but proof which excludes all reasonable doubt of his innocence.*" (Record p. 12.) (Emphasis ours.)

Territory's Instruction No. 9 (Record pp. 8-9), did not change the burden or quantum of proof. It still left "reasonable doubt" as reasonable doubt.

(g) The term "reasonable doubt" is self-defining. Territory's Instruction No. 9 could not therefore be prejudicial.

In *United States v. Breen,* (C.C.A. 2d, 1938) 96 Fed. (2d) 782, the Court states at *page 784:*

". . . The simple fact is that the term 'reasonable doubt' is so largely self-defining that attempts to use language from which the jury will get a clearer understanding of what it means than the words themselves convey may often be futile. And, because that is so, an attempted explanation which leaves reasonable doubt at the end still reasonable doubt, cannot be prejudicial . . ."

(h) The language used, considering the entire instruction, was favorable to the appellant and "is sustained by respectable authority."

The same can be said for Territory's Instruction No. 9 (Record pp. 8-9), as was said in *Miles v. United States* (1881), 103 U.S. 304, 312, 26 L. Ed. 481, at page 484, where Mr. Justice Woods speaking for the Court states:

"The charge of the court defining what is meant by the phrase 'reasonable doubt' is assigned as ground of error.

The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused and is sustained by respectable authority. *Com. v. Webster,* 5 Cush. 320; *Arnold v. State,* 23 Ind., 170; *State v. Nash,* 7 Iowa 347; *State v. Ostrander,* 18 Iowa 435; *Don-*

nelly v. State, 2 Dutch., 601; *Winter v. State,* 20 Ala. 39; *Giles v. State,* 6 Ga. 276.

We think there was no error in the charge, of which the plaintiff in error can justly complain . . ."

Accord:

Dunbar v. United States (1895), 156 U.S. 185, 15 S. Ct. 325, 39 L. Ed. 390, 395

The federal courts with the exception of two cases cited by the appellant from the United States Circuit Court of Appeals for the Eighth Circuit, hold that an instruction defining reasonable doubt which includes the phrase: "but a doubt that you could give a reason for," or words of similar import do not constitute a basis for reversing the judgment of conviction of trial courts.

(i) The state courts are not as uniform as the federal courts in upholding instructions containing substantially the same language as that objected to herein, but the majority rule follows the federal cases cited herein.

The decisions of the state courts may readily be classified as they were by the Supreme Court of the Territory of Hawaii in its opinion in this case, viz: "In some jurisdictions similar instructions have been sustained. In others they were held to constitute prejudicial error. And in still others, though criticized, the

error, if any, was considered harmless." (Record pp. 39-40.)

In *Butler v. State* (1899), 102 Wis. 364, 78 N.W. 590, the plaintiff in error was convicted of murder, and on appeal, objected to the trial court's use in its charge defining reasonable doubt, of the words "a doubt for which a reason can be given." The Wisconsin court in overruling this objection states at *page 592:*

> ". . . The phrase assailed is not an incorrect method of stating the distinction between that measure of uncertainty which justifies an acquittal and the mere fanciful, unfounded speculative doubt which can always be raised, even as to the existence of facts most obvious to our senses. A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given."

In *Emery v. State* (1899), 101 Wis. 627, 78 N.W. 145, at pages 152-155, an instruction containing similar language was upheld. The Court stated at *page 153:*

> ". . . Most persons of wide experience as trial judges have been impressed very strongly, and on many occasions, that the due administration of justice requires a careful explanation to the jury of the meaning of the important legal term here discussed, to the end that they shall not act on the theory that mere impression or surmise that the accused may be innocent, or is possibly innocent, will justify an acquittal even though they be convinced of guilt by the evidence produced in court, with such degree of certainty as to leave in their

minds, as men of ordinary common sense and experience in life, no reasonable theory consistent with innocence. That such a situation *is quite liable to be met with and justice defeated,* the efficacy of law to protect society doubted, and its administration by the courts discredited, is quite plain to persons, generally, who have presided at criminal trials and met with such painful experiences. In the judgment of the writer a careful explanation of the term 'beyond a reasonable doubt' should be given to all juries in criminal cases, and especially in important trials. The jury should be so carefully instructed to minimize the danger of their mistaking the language 'beyond a reasonable doubt' to mean beyond a mere doubt or mere possibility of innocence, or a doubt other than one founded on or arising out of, or for the want of, evidence produced in court; that it means what the language, broadly considered, naturally signifies, *that is, beyond any doubt founded in reason and common sense as applied to the evidence. They should be made to understand that if they arrive at the degree of certainty indicated by the explanation given, a conviction should follow* notwithstanding there may yet remain in their minds some mere doubt, or doubt not founded in reason, . . ." (Emphasis ours.)

The Supreme Court of Kansas after carefully considering the adjudicated cases of the various federal and state courts held in *State v. Patton* (1903), 66 Kan. 486, 71 Pac. 840, that the words " 'Such a doubt as the jury are able to give a reason for," did not constitute error in an instruction similar to the

one in the present case. The Court stated at *pages 840-841:*

"The instruction given should be considered as an entirety. By so doing it is observable that in elucidation of the expression 'reasonable doubt' the requirement of a reason for doubt is set over against capriciousness, conjecture, the indulgence of speculation upon possibilities, and the invasion of the realm of imagination. Instructions presenting such a contrast have been approved in the following cases: *Hodge v. The State,* 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Vann v. The State,* 83 Ga. 44, 9 S.E.945; *State v. Jefferson,* 43 La. Ann. 995, 10 South. 199; *The People v. Guidici,* 100 N.Y. 503, 3 N.E. 493; *State v. Harras* (Wash.) 65 Pac. 774; *Wallace v. State,* 41 Fla. 547, 26 South. 713; *Butler v. State,* 102 Wis. 364, 78 N.W. 590; *State* v. *Rounds,* 76 Me. 123; *State v. Serenson,* 7 S.D. 277, 64 N.W. 130."

The Court at *page 841* states:

"The theory of the instruction is tersely and accurately put in *Butler v. State,* where it is said:

'The phrase assailed is not an incorrect method of stating the distinction between that measure of uncertainty which justifies an acquittal and the mere fanciful, unfounded, speculative doubt which can always be raised, even as to the existence of *facts most obvious to our senses. A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.'* " (Emphasis ours.)

Accord:

State v. Fox, 116 Kan. 180, 225 Pac. 1042

In *People v. Guidici,* 100 N.Y. 503, 3 N.E. 493, the defendant was convicted of murder in the first degree, and on appeal, Guidici contended that the portion of the instruction on reasonable doubt which defined it as being "a doubt for which some good reason arising from the evidence can be given" was reversible error. In order that the comments of the court in affirming the judgment of convicted error be fully understood it is necessary to set forth a portion of the instruction, page 495, viz:

> ". . . You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence,—a doubt for which some good reason arising from the evidence can be given . . ."

The New York Court states at *page 495:*

> ". . . The criticism is limited to the definition given of a reasonable doubt, and aimed at that portion where, by way of paraphrase, the trial judge said, 'a doubt for which some good reason arising from the evidence can be given.' It should be read with the whole sentence of which it forms a part, and, so taken, seems only to distinguish that doubt which would avail the prisoner from one which is merely vague and imaginary."

Again at *pages 495-496,* the Court states:

> ". . . We find in the language of the judge nothing to mislead or perplex a juror; but if counsel

at the trial thought otherwise, the attention of the court should have been directed to it. 'An indefinable doubt, which cannot be stated, with the reason upon which it rests, so that it may be examined and discussed, can hardly be considered a reasonable doubt, as such an one would render the administration of justice impracticable; and, as to this, it has not been too strongly said, "All the authorities agree." ' Note to section 29, 3 Greenl. Ev. (14th Ed.)."

In *People v. Lagroppo,* 90 App. Div. 219, 86 N.Y.S. 116, 126, the defendant was convicted of murder in the second degree. The New York Court in affirming the judgment held that an instruction on reasonable doubt which contained the following: ". . . 'A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to do so . . .' " was not error.

In *State v. Serenson,* 7 S.D. 277, 64 N.W. 130, 132, the defendant was convicted of embezzlement, and on appeal, contended that a portion of the instruction on reasonable doubt containing the following was error: "A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a

reason for." The South Dakota Court held that this did not constitute error, and at *page 132* stated:

> ". . . The able law writer Austin Abbott, in his Brief for Criminal Cases, at page 487, discusses a 'reasonable doubt,' and says: 'The gist of the rule is that the law contemplates a doubt for which a good reason, arising on the evidence, can be given, . . .' "

In *State v. Grant*, 20 S.D. 164, 105 N.W. 97, the same Court states at *page 99:*

> "Concerning reasonable doubt, the court charged the jury as follows: 'The term "reasonable doubt" is pretty well understood, but not easily defined. It is not the mere possibility of a doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the defendant, because everything relating to human affairs and depending upon moral evidence is open to some conjectural or imaginary doubt, and because absolute certainty is not required by the law. It is not such a doubt as one might conjure or hatch up in order to acquit a friend, without any reason therefor; but it must be a substantial doubt, and one which would ordinarily impress the judgment of a prudent man in the graver and more important affairs of life. The reasonable doubt which entitles defendant in a criminal case to an acquittal is a doubt of guilt, reasonably arising from all the evidence in the case, *and it must be such a doubt as the juror is able to give a reason for.* A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the mind of the juror in that condition that he

cannot say and feel an abiding conviction to a moral certainty of the guilt of the defendant as charged in the information.'

The italicized clause is claimed to be misleading, prejudicial, and erroneous. Substantially the same phrase has been sustained in a number of cases; in others, it has been regarded as erroneous; while in others, it has been disapproved, though not held to be reversible error. 23 Am. & Eng. Ency. Law (2d) Ed. 960. Such having been the condition of the case law on the subject, this court was at liberty to adopt the view deemed most consonant with sound reason, when it held that such an instruction, qualified substantially as it was in the case at bar, did not justify a reversal. *State v. Serenson*, 7 S.D. 277, 65 N.W. 130. Further research and reflection having served to strengthen confidence in the conclusion then announced, we are constrained to hold that the charge in this case, taken as a whole should be sustained." (Emphasis ours.)

The foregoing instruction taken as a whole is substantially the same as that given in the case at bar.

In *State v. Sonnenschein* (1916), 37 S.D. 585, 159 N.W. 101, 106, the Court held that an instruction on reasonable doubt which contained the following: ". . . it must be such a doubt as the juror is able to give a reason for," was not erroneous.

In *State v. Merry* (1939), 136 Me. 243, 8 Atl. (2d) 143, the appellant was convicted of murder, and appealed. The Maine Court states at *page 153:*

"As the term is used in instructing juries in criminal cases, a reasonable doubt is not a vague, fanciful or speculative doubt, but a doubt arising out of the case as presented, *for which some good reason may be given,* and such a doubt as, in the graver transactions of life, would cause reasonable, fair-minded, honest and impartial men to hesitate and pause. 8 R.C.L. 220, *State v. Reed,* 62 Me. 129, 143." (Emphasis ours.)

In *State v. Butler,* 148 S.C. 495, 146 S.E. 418, the appellant objected to the use by the trial court in its charge on reasonable doubt, of the phrase "for which doubt you can give a sound and substantial reason." The South Carolina Court in overruling the objection states at *page 419:*

". . . 'All of these words are used, not in the sense of powerful, or overwhelming, but simply in contradiction to the words "flimsy," "fanciful," or "slight," and we cannot suppose that a jury would ever understand them in any other way. The law does not require that a criminal charge shall be proved beyond the slightest doubt, and it is only where the evidence leaves upon the minds of the jury—not a weak or slight doubt—but a serious or strong and well-founded doubt as to the truth of the charge, that the law, in its mercy, declares that the accused shall have the benefit of the doubt.'

Under the rule as laid down in the Bodie Case, we do not see any error in the charge of the presiding judge in this case."

In *Bryant v. State,* 197 Ga. 641, 30 S.E. (2d) 259, the defendant was convicted of murder and sen-

tenced to electrocution. On appeal the conviction was affirmed. The Georgia Court states at *page 269:*

> "Ground 26 of the amended motion complains of error in the charge of the court on the subject of reasonable doubt, to wit: 'Now a reasonable doubt is just what the term implies. It is a doubt based upon reason, *a doubt for which you can give a reason,*' the particular objection being to the phrase, '*a doubt for which you can give a reason.*' This exact language has heretofore been held not to be error. *Vann v. State,* 83 Ga. 44 (4), 9 S.E. 945; *Jordan v. State,* 130 Ga. 406 (1), 60 S.E. 1063; *Arnold v. State,* 131 Ga. 494 (4), 62 S.E. 806; *Hudson v. State,* 153 Ga. 695 (12), 113 S.E. 519; *Holmes v. State,* 194 Ga. 849 (2), 22 S.E. 2d 808; *Andrews v. State,* 196 Ga. 84 (10), 26 S.E. 2d 263.
>
> Counsel's motion to reconsider and overrule these cases is denied." (Emphasis ours.)

In *State v. Jefferson,* 43 La. Ann. 995, 10 So. 199, 200, the defendant was indicted for murder and was convicted of manslaughter. The Louisiana Court in affirming the judgment of the lower court held that the inclusion of the words, " '. . . It is a serious, sensible doubt such as you could give a good reason for, . . .' " in an instruction defining reasonable doubt was not error.

In *King v. State* (1920), 17 Ala. App. 536, 87 So. 701, 702-703, the defendant was convicted of manslaughter. The Alabama Court held that the inclusion

of the words, " '. . . it is a doubt for which a reason can be given' " in an instruction defining reasonable doubt was not error.

In *Wallace v. State,* 41 Fla. 547, 26 So. 713, 723-725, the Florida Court reversed the judgment because of error in the sentence but after analyzing and discussing the cases both for and against held that an instruction on reasonable doubt which includes the words: ". . . That 'a "reasonable doubt" is a doubt for which you can give a reason; . . .' " was not error, stating at *pages 724-725:*

> ". . . We are of opinion that the instruction complained of does no more than to state, in a different form, the same thing as that defined in other language in the Lovett and Woodruff Cases. It tells the jury that the burden is upon the state to establish defendant's guilt beyond a reasonable doubt,—that is, beyond a doubt for which they can give an intelligent reason; that this doubt may arise either from affirmative evidence tending to show innocence, or from lack of evidence sufficient to establish guilt; but that, if the evidence of guilt satisfies them to such an extent as to leave them without a doubt that defendant may be innocent for which they can give an intelligent reason, they should convict. This instruction puts no burden upon the defendant to furnish the jury with a reason, but it requires the state to satisfy the jury of defendant's guilt to such an extent as to leave their minds without a doubt that defendant may be innocent for which they can give an intelligent

reason. Of course, the jury are not required to state reasons for their verdict, but they are nevertheless required, by the law and by their duties as jurors, to act in the jury box as reasonable beings, and to exercise their reasoning faculties in passing upon the life and liberty of accused persons. If they entertain a doubt, they must, as reasonable men, know upon what that doubt is based, and they are required to examine into the nature and origin of the doubt far enough to ascertain that it is a reasonable one. And, if it be found that no intelligent reason can be given for entertaining a doubt, how can the conscience of the jury be satisfied with a verdict of acquittal, resting, as it does, under a solemn duty to convict, where the evidence convinces them of guilt to that extent as to leave no reasonable doubt upon their minds? To authorize an acquittal because of some vague, undefined, unintelligible, or inexplicable misgiving is to eliminate the word 'reasonable' from the definition."

In *State v. Dunn,* 159 Wash. 608, 294 Pac. 217, the Washington Court states at *pages 218-219:*

"Neither is there merit in the contention that an instruction by the court was not an adequate and complete explanation of reasonable doubt. That the term 'reasonable doubt' is clearly, though concisely, explained, is patent from a reading of the instruction, which is as follows:

'The expression "beyond a reasonable doubt" has been used by me a number of times in these instructions, and judges sometimes instruct juries at great length about its meaning. *It simply means that the proof must be beyond a doubt for which the juror who entertains the doubt can assign a*

good reason. If any juror has a doubt as to the guilt of the defendant, for which doubt he can assign a good reason, it will be the duty of that juror to vote not guilty, but if there is no such doubt, then it will be the duty of the juror to vote guilty.' " (Emphasis ours.)

In *People v. Grove,* 284 Ill. 429, 120 N.E. 277, the Illinois Court states at *page 281:*

"The seventh instruction is objected to because it requires that *a doubt must be one that the jury can give a reason for and not a conjured-up doubt, and it is contended that one may have a reasonable doubt for which he can give no reason.* While it is questionable whether instructions defining reasonable doubt add anything to the meaning of the words themselves, the instruction is not wrong." (Emphasis ours.)

In *State v. Gilbert,* 8 Idaho 346, 69 Pac. 62, 63-64, the defendant was convicted of murder in the second degree. The Idaho Court held that an instruction on reasonable doubt including the following language: ". . . A reasonable doubt is . . . a doubt which a juryman can give a reason for . . ." was not erroneous.

In *State v. Morey,* 25 Ore. 241, 36 Pac. 573, 577-578, on rehearing, the Supreme Court of Oregon after attempting to analyze the various cases on the subject held that an instruction on reasonable doubt containing the words, ". . . A reasonable doubt is such a

doubt as a juror can give a reason for . . ." was not reversible error and stated at *page 578:*

> ". . . The particular language in question may be, and no doubt is, subject to the criticism that it does not define, but needs defining; but we do not think it could have misled or perplexed the jury when considered in connection with the remainder of the instruction. *If every criminal case is to be reversed for some technical inaccuracy in the definition of a 'reasonable doubt,' then, indeed, the 'administration of justice becomes impracticable.'* Fully realizing the consequences of this decision, we have given the questions presented the utmost care, and, finding no error in the record, have no alternative but to adhere to our former opinion." (Emphasis ours.)

In *People v. Steubenvoll,* 62 Mich. 329, 28 N.W. 883, 884, 885, the Michigan Court criticized the use of the phrase, ". . . which you can give some good reason," in an instruction on reasonable doubt but held that it did not constitute reversible error.

Accord: *State v. Sauer,* 38 Minn. 438, 38 N.W. 355.

In *People v. Yun Kee,* 8 Cal. A. 82, 96 Pac. 95, the defendant objected to an instruction on reasonable doubt including the language: ". . . A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case . . ." The

California Court in holding this was not error states at *page 96:*

> ". . . If a reasonable doubt growing out of the evidence in the case is not to be based upon reason, we are at a loss to discover a foundation for it, unless it be based upon mere conjecture and irrational speculation, and this is not permissible."

The appellant (Peter L. Young) in the case at bar cites as an authority, *Pettine v. Territory of New Mexico,* 201 Fed. 489, (Appellant's Brief, pages 5-7) and *Ayer v. Territory of New Mexico,* 201 Fed. 497, (Appellant's Brief, page 7), both from the Eighth Circuit Court of Appeals, but the case of *Mansfield v. United States,* 76 Fed. (2d) 224, 230, from the same circuit clearly indicates that neither the Pettine nor the Ayer case applies to the case at bar.

The appellant likewise cites *Cowan v. State,* 22 Neb. 519, (Appellant's Brief, page 7); *State v. Parks,* 96 N.J. Law 360, 115 Atl. 305, (Appellant's Brief, pages 7-8); *State v. Rosenberg,* 97 N.J. Law 430, 118 Atl. 207, (Appellant's Brief, pages 8-9), and *State v. Linker,* 94 N.J. Law 412, 111 Atl. 35, (Appellant's Brief, page 9), which do support his contention. These cases do not represent the weight of authority as stated in Appellant's Brief, page 9, but represent the minority view. The great weight of authority as

shown by the cases cited herein supports the decision of the Supreme Court of the Territory of Hawaii.

Quoting from *page 208 of State v. Rosenberg, supra,* cited by the appellant (Appellant's Brief, pages 8-9), we find the following:

> ". . . We have adopted the doctrine of reasonable doubt as defined by Chief Justice Shaw, in *Commonwealth v. Webster,* 5 Cush. (Mass.) 295, at page 320, 52 Am. Dec. 711, in *Donnelly v. State,* 26 N.J. Law, 601, 26 page 615. The test there furnished as to when a reasonable doubt may be properly said to have arisen is stated as follows:
>
> 'Reasonable doubt is not a mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.' "

This is the test furnished by Chief Justice Shaw in *Commonwealth v. Webster,* 5 Cush. (Mass.) 295, 320, 52 Am. Dec. 711, and is essentially the test furnished in Territory's Instruction No. 9. (Record pages 8-9.) The last sentence reads: ". . . The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed,

it is your duty to convict and if you have not such belief so formed it is your duty to acquit."

The Supreme Court of the Territory of Hawaii stated: ". . . These instructions have taken the form of a definition of the adjective 'reasonable,' the inclusion of instruction of what are not reasonable doubts and the time-honored test enunciated by Chief Justice Shaw in *Commonwealth v. Webster* reported in 5 Cush. (Mass.) 295, 320." (Record page 41.)

The instruction in controversy is of this type. The instruction does not change the burden of proof. The instruction does not require any juror to give to any one his reasons for voting either for conviction or otherwise. But it does give him positive and negative guides that better enable him to judge whether or not his doubts, if any, are reasonable.

A reasonable doubt is one based on reason, if based on reason the juror can give it to himself or to his fellow jurymen during his deliberation. On the other hand, if it is not based on reason then it may be a "conjured-up doubt," or a "slight doubt," or a "probable doubt," or a "possible doubt," or a "conjectural doubt," or "an imaginary doubt." (Record p. 8.)

The instruction given by the Territory does not place upon the defendant the burden to develop reasonable doubt in the evidence.

CONCLUSION

It is respectfully submitted that the appellant has not shown that this Court has or should take jurisdiction of this case under *Section 128 of the Judicial Code, Amended, (28 U.S.C.A. Sec. 225).*

Furthermore, irrespective of the foregoing, this Court has already decided the issue herein adversely to the appellant and the appeal is therefore frivolous.

Finally, the trial court did not err in giving the jury Territory's Instruction No. 9 on reasonable doubt.

The error assigned therefore is without merit and the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 17 day of April, A. D. 1946.

Respectfully submitted,

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Receipt of three copies of the foregoing brief is acknowledged this 17th day of April, A.D. 1946.

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